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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AJ & AJ SERVICING, INCORPORATED, and ROBERT JACOBS,

Petitioners,

v.

TUDOR ASSOCIATES, LTD., II and JOSEPH N. CALLAWAY, TRUSTEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under this Court's decision in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), a jury's punitive-damage award of seven million dollars that has been vacated by a district judge as "grossly excessive and contrary to the weight of the evidence" may be "reinstated" by the court of appeals merely because the court concludes that the district judge had a "prejudice against punitive damages" without any evaluation whatever by the court of appeals of the evidentiary foundation and rationality of the jury's punitive-damage award.

2. Whether a federal appellate court that disagrees with a district judge's decision to set aside a jury's punitive-damages award may reinstate the award without making an independent evaluation of the rational justification for the award.

LIST OF PARTIES

Tudor Associates, Ltd., II, a Nebraska Limited Partnership, by and through its Trustee, Joseph N. Callaway, was an appellant below.

AJ & AJ Servicing, Inc., E.J. Realty Management Corp., Robert Jacobs, Garden National Properties, Inc., and Alan Jacobs were appellees and cross-appellants below. None of the three corporations has any parent company or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners AJ & AJ Servicing, Inc. and Robert Jacobs request that a writ of certiorari issue to review the judgment and unpublished opinion of the United States Court of Appeals for the Fourth Circuit, entered on September 20, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. A, pp. 1a-23a, *infra*) is unpublished and therefore unreported except for its listing in a table at 36 F.3d 1094. The opinion of the United States District Court for the Eastern District of North Carolina granting a new trial on the issue of punitive damages (Pet. App. B, pp. 24a-48a, *infra*) is reported at 843 F. Supp. 68.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on September 20, 1994. A timely petition for rehearing and suggestion for rehearing en banc was denied on October 18, 1994 (Pet. App. C, pp. 49a-51a, *infra*). On January 5, 1995, the Chief Justice granted an extension of time to and including February 15, 1995, for the filing of a petition for a writ of certiorari (Pet. App. D, p. 52a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: " . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT

1. Introduction

This petition concerns *only* the validity of a jury's seven-million-dollar punitive damage award that was vacated by an experienced district judge and was reinstated by a court of appeals that never considered whether the size of the jury's verdict was justified. Although the court of appeals' unpublished decision was issued several months after this Court's decision in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), the court did not cite or discuss the *Honda* opinion and its constitutional holding — that the Due Process Clause requires an "assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts." 114 S. Ct. at 2339. The court of appeals stated in its ruling why it disagreed with the trial judge's order vacating the seven-million-dollar award of punitive damages, but the court below never considered and never explained any "rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing." *Id.* On this account, the judgment of the court of appeals must, at the very least, be vacated for further consideration in light of this Court's *Honda* decision.

In addition, this Court recently granted certiorari in *BMW of North America, Inc. v. Gore*, No. 94-896, in which the principal issue is whether the Alabama Supreme Court "abdicated its responsibility" when it reviewed a four-million-dollar punitive-damage award and reduced it by only two million dollars. The resolution of that case — which will require further articulation of the responsibility of an appellate court in reviewing punitive-judgment awards — will surely affect the proper disposition of the seven-million-

dollar punitive award that the court of appeals precipitously reinstated in this case. If the Court determines not to reverse the judgment below summarily and remand for reconsideration in light of the *Honda* decision, it may appropriately grant certiorari and set this case for argument following No. 94-896. The Court could, in this case, determine the duty of a federal court of appeals that is confronted with a punitive-damages award that has been set aside as excessive by a trial judge. If the appellate court believes that the district court's reason for setting aside the award is erroneous, must it nonetheless conduct an independent evaluation of the size of that award before reinstating it?

The complex history of this litigation is only marginally relevant to the issues presented by this petition. We summarize it briefly below.

2. The Underlying Transactions

In 1979, while it was in bankruptcy, Tudor Associates, Ltd., II, sold four rental properties it owned in Durham, North Carolina, to EMT of Ohio, Inc. EMT resold the properties to three limited partnerships. Rather than paying cash for the properties, the limited partnerships gave EMT four promissory notes, which were secured by "wraparound" mortgages on the properties.

Since Alan Jacobs, along with Robert Jacobs, assisted in putting together the purchase from EMT, EMT concluded a "finder's fee" agreement with AJ & AJ Servicing, Inc. (of which Alan Jacobs was president at the time). This agreement was secured by the assignment to AJ & AJ of a one-half interest in the partnerships' promissory notes to EMT. Under the agreement, AJ & AJ collected and

disbursed payments to be made under the wraparound mortgages. AJ & AJ and EMT entered into a series of additional agreements that modified the rights of the parties under the original finder's fee agreement.

3. The Dispute in the Bankruptcy Court

In 1983 Tudor filed a fraud action in the bankruptcy court seeking to set aside both the original sale of the four properties and AJ & AJ's one-half interest in the four notes secured by the wraparound mortgages. The bankruptcy court found against EMT and awarded $11.6 million to Tudor secured by an equitable lien on EMT's remaining one-half interest in the four promissory notes, but it rejected Tudor's allegations of fraud by AJ & AJ. The bankruptcy court explicitly found that AJ & AJ had acted in good faith and had acquired its one-half interest in the promissory notes as a bona fide purchaser.

4. The District Court Lawsuit

Tudor subsequently sought to set aside AJ & AJ's interest in the notes in the present lawsuit, filed against AJ & AJ, Robert Jacobs and three others in June 1991. It alleged subject-matter jurisdiction under 28 U.S.C. § 1332 based on diversity of citizenship, as well as under 28 U.S.C. § 1334 and 28 U.S.C. § 1331. Tudor's basic claim, in an action that the trial judge described as "a simple contract action" (Pet. App. B, p. 27a, *infra*), was that the series of agreements between EMT and AJ & AJ were not binding on Tudor. The amended complaint contained six additional theories of liability.

5. The Jury's Verdicts

Trial of the action was bifurcated into liability and damage phases. Judge F. T. Dupree, Jr., who has been a federal district judge since 1970, presided over the trial. In the first phase, the jury found for Tudor against all defendants except Alan Jacobs. The special verdict was rendered in the form of answers to 25 questions. Following the damages phase, the jury deliberated for almost eight hours and then returned with compensatory damage awards totaling $529,696.50 and a punitive damage award of $7 million against AJ & AJ and Robert Jacobs.

6. The Trial Judge's Conclusions

The defendants filed motions for judgment notwithstanding the verdict and, in the alternative, for a new trial. Judge Dupree upheld the jury's verdict and compensatory-damage award on the contract theory but concluded that judgment notwithstanding the verdict should be granted on Tudor's other state-law claims. Judge Dupree went on to hold, however, that if his dismissal of the state-law causes of action were overturned on appeal, no new trial on these claims was justified (Pet. App. B, pp. 37a-38a, *infra*).

With regard to the seven-million-dollar punitive damage award, Judge Dupree said that it "jarred" his "constitutional sensibilities" (Pet. App. B, p. 38a, *infra*). He explained that he viewed such an award as "a gross miscarriage of justice" and held that, on this issue, the defendants were entitled "at least . . . to a new trial" (Pet. App. B, p. 39a, *infra*).

Judge Dupree's opinion contained a careful analysis of the opinions of Justices of this Court in earlier cases involving punitive damages such as *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) (Pet. App. B, pp. 39a-42a, *infra*). He concluded that he had committed "plain error" when, in his jury instructions, he had failed to provide the jury with "any meaningful standard or limitation" for the assessment of punitive damages (Pet. App. B, p. 44a, *infra).*

Judge Dupree's opinion also voiced substantial concerns about the fairness of punitive damage awards in general and about the confused state of the law concerning due process limits on punitive damages. He urged Congress and the state legislatures to enact corrective legislation. Despite his concerns as to the fairness of punitive damages, Judge Dupree confirmed that he "of course, will continue to apply the law as best it can be discerned from the sometimes bewildering decisions currently covering the punitive damages field" (Pet. App. B, p. 48a, *infra*).

7. The Court of Appeals' Reversal

The court of appeals reversed the district court's grant of judgment notwithstanding the verdict on the state-law causes of action, finding that the court had misinterpreted state law. The court of appeals also reinstated the jury's punitive damages verdict. The court agreed that the jury had not been properly instructed, but it concluded that AJ & AJ and Robert Jacobs had waived this issue because they had argued against an appropriate instruction at trial. The court of appeals asserted that the trial court's "admitted prejudice against punitive damages for *any* private plaintiff" made it "unlikely" that Judge Dupree "actually

weighed competing interests to determine that a new trial was necessary to avoid a miscarriage of justice" (Pet. App. A, p.22a, *infra*) (emphasis in original). Without making any appraisal of the rationality or fairness of a seven-million-dollar punitive damage award or even remanding the case to the district court for it to make a new evaluation of the award, the court of appeals reinstated the jury's verdict.

REASONS FOR GRANTING THE WRIT

1. By Reinstating the Jury's Seven-Million-Dollar Punitive Damage Award Without Considering Whether That Award Had a "Rational Basis," the Court of Appeals Violated the Constitutional Rule of *Honda Motor Co. v. Oberg*.

This Court should issue a writ of certiorari and summarily vacate the Fourth Circuit's judgment reinstating the jury's enormous punitive damage award because the Fourth Circuit's ruling ignored or violated this Court's recent decision in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994). This Court held in *Honda* that the Due Process Clause requires judicial review of the size of a punitive damage award because the award of punitive damages in an arbitrary amount denies constitutional rights. The Court concluded in *Honda* that even in a jurisdiction where significant procedural protections are available regarding punitive damages, judicial review of the *amount* of a punitive damage award is essential to ensure that punitive damages are not unconstitutionally imposed.

This Court's decision in *Honda Motor Co. v. Oberg* was announced after the present case was briefed and argued to the court of appeals. The Fourth Circuit's decision does not cite *Honda Motor Co. v. Oberg*, and the court of appeals

plainly did not take this Court's decision into account when it reversed Judge Dupree's decision.

The basis for the Fourth Circuit's reinstatement of the jury's award of seven million dollars in punitive damages is its conclusion that the district court had ordered a new trial because of personal prejudice against punitive damage awards. The Fourth Circuit itself conducted no review of the size of the punitive damages award. Acknowledging that the district court had found that "the award was so grossly excessive as to shock the conscience" (Pet. App. A, p. 20a, *infra*), the Fourth Circuit speculated that "[t]he trial court's admitted prejudice against punitive damages for *any* private plaintiff makes it unlikely that the court actually weighed competing interests to determine that a new trial was necessary to avoid a miscarriage of justice" (Pet. App. A, p. 22a, *infra*) (emphasis in original). Nonetheless, the court of appeals did not remand the case for a weighing of the "competing interests." It simply directed that the seven-million-dollar verdict be reinstated.

In this respect the Fourth Circuit abdicated the responsibility of an appellate court to review the *size* of a punitive damage award and to see to it that the district court considers the *size* of such an award. Under the common law, as explained in this Court's *Honda* opinion, a jury's award of punitive damages is reviewed by *both* the trial court and the appellate court to ensure that it is reasonable. *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991). These petitioners have been deprived of both levels of judicial oversight.

If the court of appeals was correct in rejecting the district court's decision to vacate the jury verdict, its next task was to conduct a proper review of the jury's verdict or

to direct that the district court conduct such a review. The effect of the Fourth Circuit's judgment is to implement a huge jury award of punitive damages with no judicial consideration whatever of the rationality of that decision. This subjects petitioners to a jury verdict whose size has never been reviewed by a single judge or by an appellate court of three judges to ensure against an excessive verdict. That violates this Court's teaching in *Honda Motor Co. v. Oberg*.

2. The Alleged Waiver of Proper Jury Instructions Did Not Justify the Court of Appeals' Abdication of Its Responsibility.

The Fourth Circuit found that petitioners had waived any error with respect to Judge Dupree's jury instruction regarding punitive damages (Pet. App. A, p. 20a, *infra*). This alleged waiver did not affect the wholly separate obligation of the court of appeals, when the case came before it, to review the *size* of the verdict.

The state procedures that were at issue in *Honda Motor Co. v. Oberg*, for example, failed to satisfy the Due Process Clause even though the Oregon courts were empowered to set aside a punitive damage award if the jury was not properly instructed. *See* 114 S. Ct. at 2338. Indeed, this Court specifically held that the detailed jury instructions provided under Oregon law were not a constitutional substitute for judicial review of the size of the jury's award. *See* 114 S. Ct. at 2341. *See also Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (role of district court in reviewing punitive damages award is to "determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new

trial or remittitur should be ordered"). Accordingly, even if petitioners had waived their objection to the jury instruction on punitive damages, that would not deprive them of the right to judicial review of the *size* of the punitive damage award.

Moreover, petitioners failed to submit a jury instruction on punitive damages because they contended that no jury instruction would meet the constitutional standard. [1] Having taken this litigating position, the petitioners were still entitled to have the trial judge and the court of appeals independently review the size of the jury's award to be satisfied that it had a rational basis. The court below failed to conduct such a review. [2]

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[1] Indeed, after the trial court instructed the jury, petitioners — but not respondents — objected to the court's instruction to the jury on due process grounds. Petitioners argued that the North Carolina punitive-damages jury instruction currently in use on which the trial court based its charge was inadequate under this Court's decision in *Haslip* and that the pattern jury instruction ultimately accepted by the Fourth Circuit as a prediction of North Carolina law had been *rejected* by North Carolina courts on every occasion in which it was presented to them.

[2] On appeal the petitioners challenged the constitutionality of the North Carolina punitive damages scheme on due process grounds, but they did not challenge the *size* of the punitive damage award because they had successfully argued in the district court that they should receive a completely new trial on the issue of punitive damages. While defending the trial court's decision on appeal, petitioners had no reason to anticipate that if the court of appeals reversed the trial court, it would simply reinstate the award with no further assessment of the issue. At a minimum, the court of appeals was obliged to remand the case to the trial court to apply the correct legal standard. *E.g., Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) (usual rule when district court has failed to make a finding because of an erroneous view of the law is to remand for further proceedings to permit trial court to make the missing

(continued...)

3. Summary Reversal Is Appropriate.

The Fourth Circuit's ruling in this case means that petitioners are subject to a seven-million-dollar punitive damage award even though the size of that award has not been reviewed by any court. The issue we now present can be resolved summarily, without plenary briefing and argument. It is plain from the court of appeals' opinion that the court did not apply this Court's recent decision in *Honda Motor Co. v. Oberg*. Accordingly, this Court may vacate the judgment of the Fourth Circuit and remand the case for consideration and application of this Court's decision in *Honda Motor Co. v. Oberg*.

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[2] (...continued)
findings); *see also Morgan v. Woessner*, 997 F.2d 1244, 1257 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994) (if trial court review of punitive damage award is lacking, appellate court should reverse and remand); *American Employers Ins. Co. v. Southern Seeding Servs.*, 931 F.2d 1453, 1458 (11th Cir. 1991) (remanding where district court failed to reflect its reasoning for denial of motion to alter punitive damage award); *Cole v. Control Data Corp.*, 947 F.2d 313, 320 (8th Cir. 1991) (remanding for district court review under appropriate standard).

In this case, moreover, the respondent did not defend the constitutionality of the *size* of the award. Tudor's brief on appeal acknowledged that the trial court found that "the amount shocked the court's 'constitutional sensibilities,'" and concluded that "[t]here being no point to contesting the judge's personal views, only the jury instructions must be discussed" in its brief. Brief of Appellant at 39. In light of Tudor's decision not to defend the *size* of the jury's verdict, there was no reason for petitioners (who were appellees below) to contend that the size of the award violated due process.

4. Alternatively, This Case May Be Set For Argument Together With *BMW of North America v. Gore* To Determine the Responsibility of a Federal Court of Appeals in Reviewing the Size of a Punitive Damage Award Under State Law.

In the alternative, the Court may elect to grant certiorari and set this case for argument as a companion case to *BMW of North America, Inc. v. Gore*, No. 94-896, because this case presents the related issue of the responsibility of a *federal* court of appeals when it reviews a judgment setting aside a jury verdict of punitive damages in a diversity-of-citizenship case. This case is the converse of *BMW of North America*. The petitioner in *BMW of North America* contends that the appellate court erroneously failed to reduce the jury's punitive damage award. In the present case, the opposite is true. The court of appeals approved of a jury's verdict and totally disregarded the trial court's conclusion that the jury's verdict was grossly excessive.

By considering the function of *federal* appellate courts that review punitive damage awards and how much they should defer to the conclusions of trial judges, this Court will be able to clarify the applicable standards. This Court said in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (footnote omitted), that in reviewing an award of punitive damages under state law, "the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard." In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991), the Court said that at common law, a jury's determination of

the amount of a punitive damage award was "reviewed by trial and appellate courts to ensure that it is reasonable." *See also Honda Motor Co. v. Oberg*, 114 S. Ct. at 2335 (noting that in *Haslip*, the Court "stressed the availability of both 'meaningful and adequate review by the trial court' and subsequent appellate review" in upholding the punitive damages award against due process challenge).

The federal courts of appeals have divided over the appropriate scope of appellate review of punitive damages awarded under state law. The Ninth Circuit has held that *Haslip*, rather than *Browning-Ferris*, governs court of appeals review of the amount of a punitive damage award. *See Morgan v. Woessner*, 997 F.2d 1244, 1256 n.8 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994) (punitive damages awarded for claims under federal and state law). According to the Ninth Circuit, due process requires that an appellate court must undertake "a substantive review of the amount of the award" to "determine whether a punitive damage award exceeds the amount necessary to accomplish the goals of punishment and deterrence in deciding whether it is grossly excessive." *Morgan v. Woessner*, 997 F.2d at 1257-58; *but see id.* at 1263 (Nelson, J., dissenting) (embracing view of Fifth Circuit that *Haslip* is not a vehicle for "expansive appellate review of punitive damages awards"). The Third Circuit, when reviewing a case from the Virgin Islands, also appears to have applied a *de novo* review of the trial court's assessment of a punitive damage award pursuant to its interpretation of its function under *Haslip*. *See Dunn v. Hovic*, 1 F.3d 1371, 1385 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993) ("We cannot leave the amount of punitive damages solely to the trial court . . . .").

The Fifth Circuit applies a more restrictive standard of appellate review, holding that *Haslip* creates "a narrow channel for appellate review in which the focus of a reviewing court is to ensure that, *under the circumstances of the case in question*, the award of punitive damages is not grossly excessive or unreasonable." *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991) (emphasis in original; footnote omitted). In reviewing the constitutionality of a punitive damage award, the appellate court "may only consider whether the circumstances of the case offer some support for the amount of the award. If there are *any* circumstances of probative force that support the amount of the award, then the award meets the 'reasonableness' prong of the due process test in *Haslip*." *Id.* (emphasis in original). The Fifth Circuit has upheld on due process grounds a standard of appellate review in which an appellate court may set aside a punitive damage award only if it "evinces passion, bias and prejudice on the part of the jury so as to shock the conscience." *Id.* at 1386; *see also Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1098 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992).

The Eighth Circuit likewise holds that an appellate court may overturn an award only "if it is a plain injustice or a monstrous or shocking result," and specifically anchors its holding in *Browning-Ferris*. *Latham Seed Co. v. Nickerson American Plant Breeders, Inc.*, 978 F.2d 1493, 1499-500 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 3037 (1993); *id.* at 1501 ("passion and prejudice" standard of review sufficient under *Haslip*). Similarly, in the Tenth Circuit, the trial judge has broad discretion in deciding whether to grant a new trial or to remit punitive damages, and the trial court's ruling will not be set aside on appeal unless there is "a gross abuse of discretion." *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 819 (10th Cir. 1993)

(quoting *Whiteley v. OKC Corp.*, 719 F.2d 1051, 1058 (10th Cir. 1983)). *See also Ross v. Black & Decker, Inc.*, 977 F.2d 1178 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1274 (1993) (applying abuse of discretion review standard); *American Employers Ins. Co. v. Southern Seeding Servs.*, 931 F.2d 1453, 1458 (11th Cir. 1991) (adopting *Browning-Ferris* review of district court evaluation of size of punitive damage award under abuse of discretion standard).

In the decision here under review, the Fourth Circuit applied an abuse of discretion standard. *See also Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1415 (4th Cir. 1992). The Fourth Circuit's standard of review, however, differs from that of the other circuits because the Fourth Circuit severely circumscribes the authority of a federal appellate court reviewing a punitive damage award under state law.

The Fourth Circuit holds that "if state law assigns the trial or appellate court a post-verdict role in assessing the reasonableness of a punitive damages award and specifies certain factors to be considered in making that assessment, then this body of substantive law must also be applied in federal court, but in a manner that permits consideration by *the jury* as the sole fact finder, rather than by the judge." *Johnson v. Hugo's Skateway*, 974 F.2d at 1416 (emphasis in original; footnote omitted); *see also Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991). The appellate court, in other words, plays almost no post-verdict role in assessing the reasonableness of a jury's award of punitive damages in a diversity case.

The Ninth Circuit has explicitly rejected such a dual standard of review, concluding that "[i]t should make no difference whether the imposition of such damages was by a federal or state court or whether on federal or state

claims." *Morgan v. Woessner*, 997 F.2d at 1255. None of the cases cited in this section have applied such a distinction in reviewing punitive damage awards in diversity cases as compared with awards in other cases.

The Fourth Circuit's narrow view of the role of federal appellate courts in reviewing punitive damage awards underlay its decision in this case. Accordingly, this case presents an appropriate vehicle in which to consider the proper role of federal appellate courts in reviewing the size of a punitive damages verdict. The Fourth Circuit followed *Johnson v. Hugo's Skateway* and *Mattison v. Dallas Carrier Corp.* in this case because it abdicated its independent function and rubber-stamped the jury's decision.

The Fourth Circuit's determination simply to "reinstate" the jury's punitive-damages award instead of sending the case back to the trial court in the first instance cannot be squared with this Court's repeated holding that due process requires *both* trial court and appellate court review. *See also Morgan v. Woessner*, 997 F.2d 1244, 1257 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994) (holding that appellate court should remand if district court has not assessed the reasonableness of a punitive damage award to "assure[] that the defendant will have the three stages of Due Process scrutiny endorsed by the Supreme Court in *Haslip*."). This Court should, therefore, grant certiorari and set this case for argument with *BMW of North America, Inc. v. Gore*, No. 94-896, in order to resolve the conflict among the circuits over the proper role of appellate courts in reviewing punitive damage awards.

CONCLUSION

For the foregoing reasons, certiorari should be granted and the judgment of the court of appeals should be vacated summarily and the case remanded for further consideration in light of this Court's decision in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994). Alternatively, certiorari should be granted and the case set for argument together with *BMW of North America, Inc. v. Gore*, No. 94-896.

Respectfully submitted,

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